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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-663

ROBERT FRIAS, ET AL,
Petitioners

v.

THE BOARD OF TRUSTEES OF ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL,
Respondents

On Petition For Writ Of Certiorari To The Eighth Supreme Judicial District Court Of Civil Appeals Of Texas

RESPONDENTS' BRIEF IN OPPOSITION and RESPONDENT'S MOTION FOR DAMAGES

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE SAID HONORABLE COURT:

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas delivered on July 25, 1979, is now reported as Robert Frias v. Board of Trustees of Ector County Independant School District,

et al, 584 S.W.2d 944. Rehearing in said Court was denied August 15, 1979. The October 3, 1979, order of dismissal for want of jurisdiction by the Supreme Court of Texas is set out on page 17a of the Petition for Writ of Certiorari.

JURISDICTION

Petitioners allege jurisdiction under 28 U.S.C.A. § 1257(3). Respondents concede that if this Court has jurisdiction, such would exist only under § 1257(3). However, Respondents will demonstrate hereinafter that this Honorable Court has no jurisdiction in this case because (1) absolutely no federal question is necessary to the decision rendered by the Court of Civil Appeals, and (2) the only federal question in any way involved in the decision rendered by the Court of Civil Appeals (which was the holding that Art. 14.06, Texas Election Code, is unconstitutional insofar as it attempts to prohibit corporations from making contributions and expenditures for the purpose of aiding or defeating the passage of any measures submitted to the vote of the people of a political subdivision of the State of Texas) was clearly settled, contrary to Petitioners' contentions, by the previous decision of this Court in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978), reh. den. (U.S.) 57 L.Ed.2d 1150, 98 S.Ct. 3126.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in addition to the statutes set out in the petition for certiorari, the following portions of

Chapter Nine of the Texas Election Code, pursuant to the authorization of which this cause was prosecuted by Petitioners, to-wit: Texas Election Code Ann., Articles 9.01 - 9.02, - 9.04 - 9.29 and 9.31 (Vernon 1967). (Appendix A, infra, pages 1A-17A).

QUESTIONS PRESENTED

Respondents cannot accept the two "Questions Presented" set forth on pages 2-3 of the petition for certiorari, for the following reasons:

Concerning the first Question Presented, Petitioners have once again ignored the facts of this case and have inaccurately represented to this Court (without attempting to specify it) that somehow some "erroneous propaganda" was involved prior to the holding of this school bond election on December 5, 1978. Such statements are untrue, as the record in the case is void of evidence of any misrepresentations or misleading statements on the part of the school board and/or its employees, and the trial court and the Court of Civil Appeals expressly found that *no* material misrepresentations of fact or misleading statements were made. See pages 7a-8a of Appendix A of the petition for certiorari, wherein the Court of Civil Appeals quotes the pertinent Findings of Fact made by the trial court, and then holds that the evidence "supports those findings." See also Appendix B, infra, for the full Findings of Fact and Conclusions of Law of the trial court.

Likewise, in regard to Petitioners' second Question Presented, Petitioners base their question upon the incorrect assumption that Petitioners were prohibited from inquiring into alleged "intentional misrepresentation of

fact," *and* the equally incorrect assumption that such misrepresentations ever existed. Petitioners have ignored the fact that the trial court gave Petitioners every opportunity during a trial lasting almost a week to put on any evidence they desired regarding such alleged misrepresentations or misleading statements. Petitioners totally failed to introduce any evidence of misrepresentations or misleading statements, as was correctly found by the courts below. Although both courts below correctly held that such alleged misrepresentations cannot constitute a proper ground for a statutory election contest even if there had been evidence thereof, this holding was secondary, as no such misrepresentations were ever proved.

When examined in the light of the truth of the history of this case, Petitioners' Questions Presented do not present any questions for decision by this Honorable Court, and fall of their own weight. There are no federal questions involved.

In addition, the Questions Presented by Petitioners were not timely and properly raised. Understandably, Petitioners have failed to specify how such federal questions were raised, in violation of Rule 23(f) of the Rules of this Court.

STATEMENT

Although the "Statement" in the petition for certiorari is correct in some respects, it must not be accepted as accurate, in that Petitioners incorrectly state on page 6, that the school trustees "are spending tax dollars to proceed with the illegally authorized construction;" on page 7, that the pro se Contestants "proved" that intentional misrepresentations of fact had been made by the

school board, that "false information" was disseminated and published, and in assuming that any "misleading statements and misrepresentations of facts" ever existed.

Petitioners also make other remarks in their Statement which are untrue and argumentative, such as the remark on page 6 that "All property owners . . . are suffering excessive tax burdens . . . ," and the remark on page 8 that the factual circumstances of this case make the decision of this Court in *Bellotti* "inapposite". Respondents urge that such unfounded and argumentative statements not be accepted as facts. The Court is respectfully referred to the opinion of the Court of Civil Appeals (pages 2a-4a of Appendix A of the petition for certiorari) for a concise statement of the case.

ARGUMENT

Petitioners claim in their "Reasons for Granting the Writ" that their constitutional rights of equal protection were denied by the trial court's refusal to exclude from counting the votes cast by disenfranchised voters. There was *no evidence* presented in the trial that even one disenfranchised or illegal voter cast a ballot! The trial court correctly found there was no fraud involved in the election, and that no illegal or fraudulent votes were cast (Appendix B, page 1B, infra) much less a number sufficient to affect the results of the election. These findings have never been attacked by Petitioners. And, as pointed out by the Court of Civil Appeals in its opinion (Appendix A, page 8a, of petition for certiorari): "There is no proof of any fraud, and no voters testified that they were misled or believed what is now contended to be misrepresentations or that such affected their vote."

Petitioners claim they are constitutionally entitled to access to the courts to seek redress for the "admitted misrepresentations of facts by Respondents." Petitioners do not attempt to specify what these so-called "misrepresentations" were, because they cannot point out a single one. There *weren't any*, admitted or otherwise, even though over Respondents' strenuous objections Petitioners were allowed great latitude by the trial court to introduce any evidence they desired regarding misrepresentations, voter irregularities, etc., occurring before, during or after the day of election. The trial court's findings and conclusions in Appendix B, infra, were not only supported by all the evidence, they were *required* by it. It is inconceivable that Petitioners choose to ignore the facts of this case, and assume in arguing before this Honorable Court that the record is somehow replete with fraud and lies on the part of school personnel and community leaders. As the Court of Civil Appeals' opinion expressed it so well, even if it is not the law that the trial court's jurisdiction in a Texas statutory election contest is limited to matters happening on the day of the election and pertaining strictly to the election, the Petitioners arguments are nevertheless without merit, as they failed to meet their burdens of proof. Petitioners were afforded every judicial right of access they claim now to have been denied. Petitioners are ignoring this clear part of the history of this case.

Petitioners next claim the denial to them of a jury trial in this statutory election contest was a violation of Article I § 15 of the Texas Constitution. These Respondents cannot improve on the statement of the applicable law made by the Court of Civil Appeals in its

opinion (Appendix A, at page 12a, of the petition for certiorari) when in discussing this contention it stated:

> "The next point asserts the trial Court erred in denying Contestants' constitutional right of trial by jury. Both the Seventh Amendment to the United States Constitution and Article I, Section 15, of the Texas Constitution guarantee the right of a trial by jury. But those provisions were enacted to protect rights known at common law. This case does not involve a common law right. Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948, cert denied 336 U.S. 904). This contest is strictly a statutory right. The courts of this State have consistently held that in an election contest the contestants are not entitled to a trial by jury. Boroughs v. Williamson, 312 S.W.2d 717 (Tex. Civ. App.—El Paso 1958, writ dism'd); Rouw v. Harrington, 281 S.W.2d 746 (Tex. Civ. App.—San Antonio 1955, writ dism'd); 3 McDonald, Texas Civil Practice Section 11.02 (1970). Point of Error No. 5 is overruled."

Petitioners next attempt to argue that the courts below erred in holding unconstitutional the provisions of Art. 14.06 of the Texas Election Code which on their face would render illegal the corporate contributions here involved, and urge, due to the lack of "truthfulness" of the statements and representations made by school personnel, that *First National Bank of Boston v. Bellotti*, supra, has no applicability to the First Amendment exercises by the banks and business corporations here involved. Petitioners ignore the fact that the Attorney General of Texas, in Opinion H-1175 (1978) (page 11a of Appendix A to the petition for certiorari) had previously held invalid the proscriptions of such Art. 14.06, and that both courts

below also based their holdings on this authority. As pointed out above, this attempted distinction is without merit, as no untruthfulness was involved nor proven. Moreover, even had there been evidence of misrepresentations of school needs, etc., by school officials in the record, the Court of Civil Appeals nevertheless did not need to decide the question of the constitutionality of Art. 14.06 of the Texas Election Code vis a vis the *Bellotti* decision and Opinion H-1175 of the Attorney General of Texas. The decision of the trial court was based on two holdings: (1) the fact that Art. 14.06 was unconstitutional insofar as applicable to this election, and equally importantly, (2) that the making of contributions by banks and business corporations to a committee which supported passage of the bond election did not constitute a proper ground for a contest of such election, under applicable Texas law, as such matters are not within the Court's jurisdiction in a statutory election contest. Specifically, these two conclusions of law were as follows (Appendix B, pages 2B-3B, infra):

> "3. Contributions made by a national bank and Texas business corporations in support of passage of the December 5, 1978 bond election propositions are not illegal, and the statutory prohibitions thereto are unconstitutional by virtue of the decision of the Supreme Court of the United States in First National Bank of Boston, et al vs. Bellotti, 98 S.Ct. 1407 (1978), as confirmed by Opinion No. H-1175 by the Attorney General of the State of Texas.
>
> "4. The making, by a bank and Texas business corporations, of contributions in support of passage of the December 5, 1978 school bond election did not constitute a proper ground for a contest of such election, as such matters are not within the Court's jurisdiction, even if the statutory prohibitions to the making of such contributions are not unconstitutional."

It is clear that the decisions of the courts below are well based on distinct principles of Texas law, and any federal questions presented are not necessary to the determination and judgments rendered in the case. Of course, the traditional practice of this Court is to avoid decision of unnecessary constitutional issues and to refuse to decide constitutional questions when the record discloses other grounds of decision. *Alexander v. Louisiana,* 405 U.S. 625, 31 L.Ed.2d 536, 92 S.Ct. 1221 (1972); *Neese v. Southern Railway Company,* 350 U.S. 77, 100 L.Ed. 60, 76 S.Ct. 131 (1955). Although the Court of Civil Appeals saw no need to expressly confirm trial court Conclusion of Law 4 above, it clearly could have done so, as it did expressly confirm, in regard to alleged "misrepresentations," the Texas rule of law upon which such Finding 4 was based in the trial court, to-wit, that only such matters as happened on the day of the election and pertain strictly to the election itself are within the Court's jurisdiction and inquiry in a statutory election contest. (Appendix A, pages 4a-7a of the petition for certiorari.) This rule is sound when applied to the corporate contributions made to the independent Unite for Odessa committee, which were not received or used by Respondents. It is Texas law, even if Art. 14.06 were not unconstitutional, that corporation A cannot, by making contributions to political committee B, thereby (intentionally or otherwise) jeopardize the results of an election held by political subdivision C, by thereby creating a ground for a statutory election contest. If the law were otherwise, all

elections held in Texas would be subject to obvious but uncontrollable chicanery and chaos.

This cause involves no actual or threatened criminal prosecution against any bank or corporate contributor to such Unite for Odessa committee. The record is also void of any showing that such corporate advocacy had any significant influence on the bond election or threatened to undermine democratic processes. Although the fact that corporate "advocacy may persuade the electorate is hardly a reason to suppress it," *Bellotti,* supra, 435 U.S. at 790, 55 L.Ed.2d at 727, Petitioners nevertheless falsely state on page 11 of their Petition for Certiorari that "the same bond issues had failed to pass on three previous occasions." Petitioners know full well this is not true—they even conceded in their briefs in the courts below that such three previous bond elections involved propositions "not exactly in these amounts—and not for the exact purpose . . .".

CONCLUSION

For the reasons stated above, and because there are no special or important reasons for the granting of the Writ, Respondents say that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents

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RESPONDENT'S MOTION FOR DAMAGES

TO THE SAID HONORABLE COURT:

Respondent Board of Trustees of Ector County Independent School District respectfully moves the Court to award it reasonable damages, pursuant to Rule 56 of the Rules of this Court, for its delay by reason of the

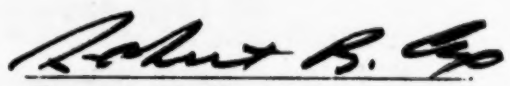
commencement and pendency of this proceeding, in the event that the Petition for Writ of Certiorari is denied.

The ground for this motion is that the petition is frivolous and was filed herein without any basis or ground for granting the same, as is more fully shown in Respondents' brief in opposition to such petition, supra.

A reasonable sum for damages for Respondents' delay is the sum derived by multiplying $6,337.46 times the number of days involved in this cause from October 3, 1979, (the date of final disposition of such cause in the Supreme Court of Texas) through final disposition of same by this Court, as is more fully shown in the affidavit of Charles L. Walker, Assistant Superintendent for Business Affairs for Respondent school district, set forth immediately following this motion.

Dated: November 12, 1979.

Respectfully submitted,



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AFFIDAVIT

THE STATE OF TEXAS §
COUNTY OF ECTOR §

BEFORE ME, the undersigned authority, on this day personally appeared CHARLES L. WALKER, known to me to be a credible person, who after being by me first duly sworn, on his oath deposes and says:

"I am the Assistant Superintendent for Business Affairs of the Ector County Independent School District, and reside in Odessa, Texas. I have been employed by such school district for 37 years. The Ector County Independent School District has its administrative offices in Odessa, Ector County, Texas, and this school district includes within its boundaries all of the County of Ector, State of Texas. Such district currently has an enrollment of approximately 23,250 students, and an annual budget of approximately $41,000,000.00.

On December 5, 1978, the Ector County Independent School District conducted an election for the purpose of authorizing such district to issue 21.6 million dollars in school bonds. Three propositions were submitted to the voters of Ector County, to-wit: Proposition No. 1 called for $8,807,000.00 in bonds to construct additions to, equip and remodel existing school buildings; to construct and equip a food service warehouse building; and to acquire land for sites for the food service warehouse and the transportation facilities building; Proposition No. 2 called for $9,293,000.00 in bonds for the site, construction and equipping costs of two elementary school buildings and one junior high school building; and Propo-

sition No. 3 called for $3,500,000.00 in bonds for the construction and equipping of a sports stadium complex. Proposition No. 1 was passed by the voters 9,030 to 8,007; Proposition No. 2 was passed 8,898 to 8,146; and Proposition No. 3 was passed 8,704 to 8,289.

Due to pendency of the election contests previously filed by Robert Frias, et al, in the 161st District Court of Ector County, and the appeals taken therefrom by these election contestants to the Court of Civil Appeals, the Supreme Court of Texas and the Supreme Court of the United States, it has been impossible for the Ector County Independent School District to sell any or all of these $21,600,000.00 in bonds approved at the December 5, 1978, election, or to proceed with the needed school improvements and construction projects so authorized by the voters (except for securing partial architectural services), which has caused serious detriment and damage to children attending school in the district. For example, students in at least one grade level of seven separate elementary schools are currently able to attend only half-day sessions of school, due to inadequate classroom space. One other elementary school has had to utilize nearby church-owned facilities, due to inadequate classroom space. These space and other educational inadequacies will be eliminated when the construction projects authorized in the bond election are completed.

Based upon what I consider to be very informed estimates, the inflation rate in the construction industry in the Ector County, Texas, area is now, and has been since December of 1978, at least 10-1/2% per year. The originally scheduled dates for awarding contracts on each of the twenty construction projects authorized at the bond

election ranged from January of 1979 through October of 1979.

If the litigation attacking such bond election were concluded at the present time, the dates which could be scheduled for awarding such contracts would range from February of 1980 through July of 1980, a delay of from nine to twelve months as to each contract, resulting in an increase from the original total cost estimates of such projects of $21,728,459.00 to the November 8, 1979, cost estimates thereof of $23,704,426.00; a total additional cost due to inflation of $1,975,967.00.

It is estimated that inflation is currently adding $6,337.46 per day of delay to the total costs of such construction projects, and that if such litigation is not concluded for six months following the date of this affidavit, that the May 8, 1980, cost estimates thereof will be $24,845,169.00; a total additional cost due to inflation of $3,116,710.00.

An emergency situation exists in regard to the need to be able to sell such bonds immediately, as the amount of such bonds submitted to the voters was conservatively set at $21,600,000.00, and it is now almost a certainty that the projects so authorized can not be conducted and constructed in the size and with the quality desired and originally contemplated, due to the $1,975,967.00 estimated loss of purchasing power of the bond proceeds. Inflation rates will further reduce the purchasing power of these bond proceeds if the delay is continued."

Charles L. Walker

CHARLES L. WALKER

THE STATE OF TEXAS §
COUNTY OF ECTOR §

SWORN TO AND SUBSCRIBED before me by the above named CHALES L. WALKER, on this the 16th day of November, 1979, to certify which witness my hand and seal of office.

Jessie Ballard
Notary Public in and for
ECTOR COUNTY, TEXAS

(SEAL)

CERTIFICATE OF SERVICE

I, ROBERT B. COX, Attorney for Ector County Independent School District and W. M. Holm, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on November 17, 1979, I served three copies of the foregoing Respondents' Brief in Opposition and Respondents' Motion for Damages on Robert Frias, et al, petitioners herein, by depositing such three copies in a United States mail box, in a duly addressed envelope, with first class postage prepaid, to Gloria Tanner Svanas, attorney of record for petitioners, at 1813 East Eighth Street, Odessa, Texas, 79761.

Robert B. Cox
ROBERT B. COX

APPENDIX A

Article 9.01 District court, jurisdiction and venue

The district court shall have original and exclusive jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices, or federal offices, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature.

The venue of suits or contests between candidates for any office to be filled by the choice of voters of the entire state shall be in Travis County. The venue of suits or contests between candidates for any justice of any Court of Civil Appeals shall be in the county where said Court of Civil Appeals has its sittings.

The venue in all other election contests between candidates shall be in the county where the candidate receiving the certificate of election resides. If there is but one district court in the county in which venue is placed by this law and the judge of said court is disqualified to hear any contest, said judge shall be replaced for purposes of said contest in the manner provided by law for civil suits.

Nothing herein shall be construed to prohibit the district court in the county where any such contest may be filed from changing the venue to some adjacent county, upon showing of adequate cause. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 129.

Art. 9.02 Contest or prosecution by Attorney General

(1) In any special, general, or primary election in this State for any office, national, state, district, county, precinct, school, or municipal, or any election on any proposition, the Attorney General of Texas, in the case of elections involving two (2) or more counties, and the district and county attorneys, in the case of elections involving less than two (2) counties, may on their own motion, and shall when allegations of election frauds are presented to them by written affidavit of two (2) or more reputable citizens, investigate the conduct of such election and the making, canvassing, and reporting of returns. To make effective the power of such officers to investigate, the Attorney General, in elections involving two (2) or more counties, and the district and county attorneys in all other elections, are hereby authorized to impound all of the election records in the hands of any county clerk, district clerk, or any other election official by applying for and obtaining an order of a district court placing such records in the custody of the court to be examined by such officers in the presence of the district judge or a grand jury. All of such records, except the stub box, shall be subject to inspection and examination by the attorneys for the State in the cases hereby placed within their respective jurisdictions. The stub box containing identification of the individual voters shall not be opened or inspected by anyone except as otherwise provided in this Act with reference to election contests and in a grand jury room when alleged violations involve the contents of said box.

The application for impoundment and inspection of records shall be filed with the district court of a county

in which the election was held, or an adjoining county, or Travis County in the case of state-wide elections, and the judge of said court shall immediately issue an order impounding such records in a vault or other secure place under such terms and conditions as will keep the records under his custody and control during the entire examination and inspection proceeding and for such additional time as he may direct. The ex parte proceeding herein provided for inspection in the presence of the judge shall be conducted in the usual manner as a court of inquiry, and the court shall issue such processes for witnesses and records relevant to the conduct of such election as may be requested by the appropriate attorney for the State, and disregard of subpoenas or other processes or refusal to testify at such hearing shall be punished by the court as in civil cases.

(2) The summary court proceeding and venue set out in subsection (1) above may be followed in the investigation and development of evidence relating to all other alleged violations of the Texas election laws. The Attorney General of Texas is hereby authorized to appear before a grand jury and prosecute any violation of the election laws of this State by any candidate, election official, or any other person, in state-wide elections, or elections involving two (2) or more counties. He may institute and maintain such prosecution alone or in conjunction with the county or district attorney of the county where such prosecution is instituted. He may call upon and direct county and district attorneys to handle the investigations and prosecutions provided for above or to assist him in such procedures. This Section is intended to be cumulative and in addition to all other prosecutions authorized by other Sections hereof and other statutes. Concurrent venue

for indictments and prosecutions under this Section shall be in the county where the election law violation occurred, or an adjoining county, or in Travis County if the violation involves or relates to a state-wide election for any State or national office or any proposition submitted to the people.

(3) Any subpoena or subpoena duces tecum issued by the clerk of any district court for any hearing, election contest, or election law violation shall be effective if served anywhere within this State, provided, however, no witness shall be punished for failure to comply with such subpoena or subpoena duces tecum unless the fees provided by law are tendered him as required by statute or court rule. When called upon by the Attorney General, the Department of Public Safety and Texas Rangers shall serve any subpoenas and assist in any investigations which may be necessary.

(4) The expense of any investigation on the part of the Attorney General of an election law violation shall be paid by the State of Texas. There is hereby appropriated for the biennium of 1951-52 the sum of Five Thousand Dollars ($5,000) out of funds not otherwise appropriated from which such expenses may be paid. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 130.

Art. 9.04 Reply to notice of contest

The person holding such certificate shall, within ten (10) days after receiving such notice and statement, deliver, or cause to be delivered, to said contestant, his agent or attorney, a reply thereto in writing. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 132.

Art. 9.05 Service of notice

The notice, statement and reply required by the two preceding articles may and shall be served by any person competent to testify, and shall be served by delivering the same to the party for whom they are intended in person, if he can be found in the county, if not found, then upon the agent or attorney of such person, or by leaving the same with some person over the age of sixteen (16) years at the usual place of abode or business of such person. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 133.

Art. 9.06 Where to file papers

If the contest be for the validity of an election for any State office, except the offices provided for in Section 155 [art. 9.27], or for any district office, except Members of the Legislature, or for any county office, a copy of the notice and statement of the contestant and of the reply thereto of the contestee served on the parties shall be filed with the clerk of the court having jurisdiction of the case. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 134.

Art. 9.07 Cause to have precedence

When the notice, statement and reply have been filed with the clerk of the court, he shall docket the same as in other causes, and the said contest shall have precedence over all other causes. If the office contested for be that of district clerk, then a clerk pro tem shall be appointed as is provided by law in suits where the clerk is a party to the suit. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 135.

Art. 9.08 Evidence and procedure

In trials of all contests of election, the evidence shall be confined to the issues made by the statement and reply thereto, which statement and reply may be amended as in civil cases. As to the admission and exclusion of evidence, the trial shall be conducted under the rules governing proceedings in civil causes. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 136.

Art. 9.09 To execute bond

Whenever the validity of any election for an officer other than for Members of the Legislature is contested, the contestee shall, within twenty (20) days after the service of said notice and statement of such contest upon him, file with the clerk of the court in which such contest is pending a bond with two (2) or more good and sufficient sureties, payable to the contestant, to be approved by said clerk, in an amount to be fixed by said clerk, and not less than double the probable amount of salary or fees or both, as the case may be, to be realized from the office being contested for a period of two (2) years; conditioned that, in the event the decision of the contest shall be against such contestee and in favor of the contestant, such contestee will pay over to such contestant whatever sum may be adjudged against him by a court having jurisdiction of the subject matter of such bond. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 137.

Art. 9.10 Failure to fiie bond

If the contestee fails to file the bond as required in the preceding Section [art. 9.09], and within the time therein prescribed, said clerk shall notify the contestant immedi-

ately of such failure; and such contestant shall have the right within ten (10) days after such notice, to file a like bond payable to the contestee, conditioned that, in the event the decision of the contest is against him and in favor of the contestee, he will pay over to such contestee whatever sum may be adjudged against him, the said contestant, by a court having jurisdiction of the subject matter of such bond. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 138.

Art. 9.11 Execution of bond by contestant certified

Immediately upon the filing of said bond by the contestant, the clerk shall certify in writing, and under his official seal, to the Governor, that the contestee failed to give the required bond, and that the contestant has given such bond in accordance with law. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 139.

Art. 9.12 To commission contestant

Upon receiving such certificate from the clerk, the Governor shall issue a commission to the said contestant for the office in controversy pending such contest; and thereupon the contestant, upon qualifying in said office as required by law, shall exercise all the rights and powers and perform all the duties of said office for the full term thereof unless it shall otherwise be determined and ordered by the court upon the trial of such contest. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 140.

Art. 9.13 Failure of contestant to execute bond

The Governor shall issue the commission to the contestee at the time provided by law as in other cases, unless

he has been notified of the failure of such contestee to file the bond required by Section 137 [art. 9.09], in which event the Governor shall withhold the issuance of such commission until after the time allowed the contestant to file such bond has elapsed; but, if the said contestant shall also fail to file bond as provided in Section 138 [art. 9.10], and within the time therein required, the clerk shall certify all the facts in the case, under his official seal to the Governor, who shall thereupon issue the commission to the contestee. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 141.

Art. 9.14 Fraudulent vote not counted

If any vote or votes are found upon the trial of any contested election to be illegal or fraudulent, the trial court shall subtract such vote or votes from the poll of the candidate who received the same, and after a full and fair investigation of the evidence shall decide to which of the contesting parties the office belongs. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 142.

Art. 9.15 Election declared void

If it appears on the trial of any contest provided for in Section 134 [art. 9.06] that it is impossible to ascertain the true result of the election as to the office about which the contest is made, either from the returns of the election or from any evidence within reach or from the returns considered in connection with other evidence, or should it appear from the evidence that such a number of legal voters were, by the officers or managers of the election, denied the privilege of voting as, had they been allowed to vote, would have materially changed the result, the

court shall adjudge such election void, and direct the proper officers to order another election to fill said office; which election shall be ordered and held and returns thereof made in all respects as required by the general election laws of the State. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 143.

Art. 9.16 Bonds subject to suit

The bonds required to be filed by the contestant and contestee under the provisions of this chapter [arts. 9.01-9.38] shall remain on file in the office of the clerk where filed, and may be sued upon as other bonds. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 144.

Art. 9.17 Appeal available

Either the contestant or contestee may appeal from the judgment of the district court to the Court of Civil Appeals, under the same rules and regulations as are provided for appeals in civil cases; and such cases shall have precedence in the Court of Civil Appeals over all other cases. In cases of appeal as provided for in this Section [this article], the clerk shall, without delay, make up the transcript and forward the same to the clerk of the Court of Civil Appeals for that district. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 145.

Art. 9.18 Taxing costs

The costs in all contested election cases shall be taxed according to the laws governing costs in civil cases, except when otherwise specially provided, and bond for cost may be required as in civil suits. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 146.

Art. 9.19 Measure of damages

Where the contest shall have been decided against one of the parties and the other party shall have filed a bond and performed the duties of the office under the provisions of this chapter [arts. 9.01-9.38], the bond so filed shall inure to the benefit of the successful party in any suit thereon in a court having jurisdiction of the amount in controversy; and the measure of damages recoverable, besides cost of suit, shall be the salary, fees, and emoluments of office of which he has been deprived, less such reasonable expenses as the party holding the office shall have incurred in executing the duties of the office; provided that he shall have acted in good faith in receiving the certificate of election or commission for the office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 147.

Art. 9.20 For Legislature

Initiation of election contest

Section 1. A candidate for State Senator or Representative may initiate election contest proceedings at any time after the returns have been deposited in the office of the county clerk of every county comprising the district as provided in Articles 119, 123, and 124 of this code, but not later than 30 days after the date of the election.

Notice and statement

Sec. 2. The contestant initiates election contest proceedings by giving notice in writing to the candidate who is shown by the returns to have the greatest number of votes when the returns of all counties are totaled, and by

delivering to him, his agent or attorney, a written statement of the grounds on which the election is contested. Within the same period of time, the contestant shall mail a certified copy of the notice and statement to the President of the Senate or to the Speaker of the House of Representatives, as the case may be, in care of the Secretary of State.

Reply

Sec. 3. The candidate who receives the notice and statement shall cause a reply in writing to be delivered to the contestant, his agent or attorney, within 10 days after receiving the notice and statement; and within the same period of time he shall mail a certified copy of the reply to the President of the Senate or to the Speaker of the House of Representatives, as the case may be, in care of the Secretary of State.

Service; use of certified mail

Sec. 4. (a) The notice, statement, and reply may be served as provided in Article 133 of this code, or by certified mail with return receipt requested.

(b) When certified mail is used for service or to transmit a copy of the notice, statement, or reply to the Secretary of State, the fact and date of sending and the fact and date of receipt may be proven with window receipts and return receipts for certified mail.

Duty of Secretary of State

Sec. 5. (a) If the contest involves the result of a general election, the Secretary of State shall submit the papers of the case to the President of the Senate or to the

Speaker of the House of Representatives, as the case may be, on the second Tuesday in January following the election. The papers of the case consist of the copies of the notice, statement, reply, and the Secretary of State's certified statement of the total votes cast for each candidate for the office as shown by the official canvass of the returns.

(b) If the contest involves the result of a special election, and the Legislature is not in session when he receives the notice, statement, and reply, the Secretary of State shall submit the papers on the opening day of the first legislative session to be convened after the date of the election; and if the Legislature is in session when he receives the notice, statement, or reply, he shall submit the papers within three days after the day he receives the copy of the reply.

Art. 9.21 Depositions taken

At any time after filing said papers with said returning officer, either party to said contest may proceed, at his own expense, to take such written testimony as he may deem proper, having first served the opposite party, his agent or attorney, with a copy of the interrogatories he intends to propound to each witness, and the name of the officer before whom the same will be answered as well as the time and place of taking such testimony. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 149.

Art. 9.22 Who may take such depositions

Any officer authorized by the law of this State to administer oaths, upon being satisfied as to any costs, including his own fees, that may accrue in the taking of

such testimony, shall proceed upon the application of the party desiring it, to summon the witness or witnesses named in the interrogatories and take his or their answers in writing and under oath to such interrogatories and cross interrogatories as may be propounded in writing. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 150.

Art. 9.23 How depositions may be returned

The answers of each witness shall be reduced to writing and signed by such witness, and sworn to by such witness before the officer taking the same, and shall be certified to by such officer and sealed in an envelope; and the name of said officer shall be written by him across the seals; and he shall forward the same without delay by mail or other safe conveyance to the President of the Senate or Speaker of the House of Representatives, as the case may be, to the care of the Secretary of State, at the seat of government. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 151.

Art. 9.24 Referred to committee

The notice and statement of contest and the other papers pertaining thereto shall immediately after the organization of the Legislature be opened by the President of the Senate or by the Speaker of the House of Representatives, as the case may be; and the same shall be referred to the committee on privileges and elections of the House in which the contest is pending, which committee shall proceed without delay to fix a time for the hearing of said case, and, after due notice to the parties thereto shall investigate the issues between said parties, hearing all the legal evidence that may be presented to said committee, and shall as soon thereafter as practicable

report their conclusions of law and fact in respect to said case to the House by which said committe was appointed, accompanied by all the papers in the cause, and the evidence taken therein, with such recommendations as may to them seem proper. Any one or more of the committee dissenting from the views of the majority may present a minority report. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 152.

Art. 9.25 Hearing by committee

The rules of evidence and the laws in force respecting the admissibility of evidence, the taking of depositions and the issuance and service of process in the district courts of this State shall be observed by said committee, so far as the same may be applicable. Said committee shall have the power to send for persons and papers, and the chairman of said committees shall have the power to issue all process necessary to secure the attendance of witnesses and the production of papers, ballot boxes and other documents before said committee and such process shall be executed by the sergeant-at-arms of the House in which the contest is pending, or by such other person as the presiding officer of said House may designate. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 153.

Art. 9.26 Procedure by House

The House in which the contest is pending shall, as soon as practicable after the report of the committee has been received, fix a day for the trial of the contest, and shall proceed to determine whether the contestant or contestee, or either of them, is entitled to the contestant's seat; provided, the said House may hold the election void after full consideration of all the evidence and for the

reasons prescribed in Section 143 [art. 9.15] and in such case the Governor shall at once be notified of the vacancy. Such fees shall be paid to the witnesses and the officers serving the process as shall be prescribed by the rules of the House in which said contest is pending, and no mileage or per diem shall be paid to either of the parties to said contest until said case is determined, and in no case shall any mileage or per diem be paid to any party against whom any contest is decided. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 154.

Art. 9.27 Contest for State office

If the contest be for the validity of any election for Governor, Lieutenant Governor, Comptroller, State Treasurer, Land Commissioner or Attorney General, the same shall be tried and determined by both Houses of the Legislature in joint session, and the provisions of this chapter [arts. 9.01-9.38] governing in case of a contest for the validity of an election for members of the Legislature shall apply to and govern in a contest for the office above named, as far as applicable. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 155.

Art. 9.28 United States Senator

If the nomination of any candidates for United States Senator be contested, the same shall be conducted under the provisions of the law regulating contests for Governor. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 156.

Art. 9.29 For Presidential electors

Any person intending to contest the election of any or all of the persons duly declared elected as electors of

president and vice-president, shall within ten (10) days from the said fourth Monday in November, file with the Secretary of State a written statement of the ground on which such contestant relies to sustain such contest, and shall within such time, notify the contestee thereof in writing, and deliver to him, his agent or attorney, a copy of said statement. The contestee shall, within eight (8) days after receiving such notice, file with the Secretary of State his reply thereto in writing. The contest shall, as soon thereafter as possible, be tried and determined by the State Board of Canvassers, consisting of the Governor, one (1) citizen of the state, appointed by the Governor with the advice and consent of the Senate, who shall serve for a term of two (2) years, and Secretary of State, or any two (2) of them; and their decision shall be rendered at least two (2) days before the time fixed by law for the meetings of the electors. Such decision, in which two (2) at least of such Board shall join, shall be final, and certificates of election, in accordance therewith shall at once be issued by the Secretary of State to the proper parties. Where not otherwise herein provided, the provisions of law relating to contests for the validity of an election for members of the Legislature shall apply to such contests for presidential electors. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 157; Acts 1963, 58th Leg., p. 1138, ch. 442, § 14.

Art. 9.31 Parties defendant

In any case provided for in the preceding Section [art. 9.30], the county attorney of the county, or if there is no county attorney, the district attorney of the district, or the mayor of the city, town or village, or the officer who

declared the official result of said election, or one of them, as the case may be, shall be made the contestee, and shall be served with notice and statement, and shall file his reply thereto as in the case of a contest for office; but in no case shall the costs of such contest be adjudged against such contestee, or against the county, city, town, or village which they may represent, nor shall such contestee be required to give bond upon an appeal. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 159.

APPENDIX B

CONSOLIDATED CAUSE
No. B-54,127

IN THE DISTRICT COURT OF
ECTOR COUNTY, TEXAS
161ST JUDICIAL DISTRICT

ROBERT FRIAS, ET AL,

v.

BOARD OF TRUSTEES OF ECTOR COUNTY
INDEPENDENT SCHOOL DISTRICT, ET AL

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above captioned election contest came on for trial before the Court without a jury on March 13, 1979. The Contestants were present in person and each as attorney pro se, and the Contestees were present in person and by their attorneys. After considering the pleadings, the evidence, and arguments presented by and on behalf of the parties, judgment in such cause was signed and entered on March 19, 1979. The Court, in response to a request from the attorney for Contestants, makes its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. This cause is a statutory election contest.

2. No material misrepresentations of fact or misleading statements were made by Contestees or the employees of such school district prior to the December 5, 1978 school bond election.

3. There was no fraud involved in the December 5, 1978 school bond election.

4. There were no illegal or fraudulent votes cast in the December 5, 1978 school bond election.

5. It is not impossible to ascertain the true and correct results of the December 5, 1978 school bond election.

6. No legal voters were denied the privilege of voting as, had they been allowed to vote, would have materially changed the results of the December 5, 1978 bond election.

7. No irregularities occurred in the conduct of such December 5, 1978 bond election such as to render it impossible to determine the true will of a majority of the qualified voters participating.

CONCLUSIONS OF LAW

1. Misleading statements and misrepresentations of facts by Contestees and school district employees alleged to have occurred prior to the December 5, 1978 bond election do not constitute any proper grounds for an election contest, as only such matters as happened on the day of the election and pertain strictly to the election itself are within the Court's jurisdiction and may be inquired into or determined by the Court in an election contest.

2. Contestants were not entitled to a trial by jury.

3. Contributions made by a national bank and Texas business corporations in support of passage of the December 5, 1978 bond election propositions are not illegal, and the statutory prohibitions thereto are unconstitutional

by virtue of the decision of the Supreme Court of the United States in First National Bank of Boston, et al vs. Bellotti, 98 S.Ct. 1407 (1978), as confirmed by Opinion No. H-1175 by the Attorney General of the State of Texas.

4. The making, by a bank and Texas business corporations, of contributions in support of passage of the December 5, 1978 school bond election did not constitute a proper ground for a contest of such election, as such matters are not within the Court's jurisdiction, even if the statutory prohibitions to the making of such contributions are not unconstitutional.

5. The December 5, 1978 bond election and the results thereof are in all things valid and upheld; such results being the passage of all three propositions submitted to the voters.

SIGNED this 2nd day of April, 1979.

/s/ J. H. STARLEY
J. H. Starley, Judge Presiding